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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-274

Winston-Salem/Forsyth County Board of Education,

Petitioner

v.

Catherine Scott, et al,

Respondents

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

****

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Petitioners pray that a Writ of Certiorari be issued to review the opinion and order of the United States Court of Appeals for the Fourth Circuit entered in this case on June 10, 1971.

OPINIONS BELOW

The decision of the United States District Court for the Middle District of North Carolina of June 25, 1970, is reported in 317 F. Supp. 453. It is set forth in the Appendix, pp. A-1 to A-85.

The opinion of the United States Court of Appeals for the Fourth Circuit has not yet been reported. It is set forth in the Appendix, pp. A-91 to A-104. The Order of the District Court of July 17, 1970, is set forth in the Appendix, pp. A-86 to A-90. The Memorandum Orders of the District Court of June 22, 1971 and July 26, 1971, on remand from the Court of Appeals are set forth in the Appendix, pp. A-105 to A-115.

JURISDICTION

The opinion-order of the United States Court of Appeals for the Fourth Circuit was rendered June 10, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Where tne unchallenged findings of fact of the District Court support the conclusion that the petitioner is operating a school system in which no person is effectively excluded from any school because of race or color, did the Court of Appeals err in ordering the petitioner to file a new plan of desegregation?

2. Did the Court of Appeals err in so construing Swann v. Charlotte-Mecklenburg Board of Education, ___ U.S. ___, 91 S. Ct. ___, 28 L. Ed. 2d 554 (1971) as to require the achievement of racial balance in a school system in which the predicates upon which the decree in Swann was fashioned do not exist; thereby, erroneously converting the racial balance requirement found permissible under the particular facts of Swann to a requirement of substantive law?

3. If not, should not an "equitable decree", under the facts of this case, at least include a reasonable time limitation after which court ordered "grouping, pairing, transportation and other bizarre devices" to

achieve racial balance will terminate and the Board of Education will be at liberty to assign pupils on a non-discriminatory basis without regard to race or color?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

This action was filed on October 2, 1968, in the United States District Court for the Middle District of North Carolina by Negro school children and their parents who alleged the denial of equal protection of the laws arising out of the operation of the petitioner's school system.

The facts of this case are set out in the Memorandum and Order of the District Court of June 25, 1970 (A-1 et seq.) about as succinctly as they can be stated, and we respectfully invite the Court's attention to the findings of fact as set out therein. We also invite the Court's attention to the July 17, 1970 Order of the District Court. (A-86 et seq.)

After a hearing on the merits, the District Court, on June 25, 1970, entered the Memorandum and Order above referred to (A-1 to A-85) making extensive findings of fact and concluding that the petitioner was operating its school system in compliance with constitutional requirements except insofar as it had not changed the racial composition of three schools and insofar as it allowed freedom of transfer for any students on a nondiscriminatory basis, after majority to minority transfers have been given priority. The plaintiffs gave notice of appeal from the Order of the District Court and the petitioner also gave notice of appeal from the Order directing it to file a plan for the reasonable integration of the three schools designated in the Order. Pending the appeals, the petitioner paired and clustered the three schools with five others in compliance with the orders of the court.

After this Court's opinion on Swann v. Charlotte-Mecklenburg Board of Education, ____ U.S. ____, 91 S. Ct. ____, 28 L.Ed.2d 554 (1971), and Davis v. Board of Commissioners of Mobile, ____ U.S. ____, 91 S. Ct. ____, 28 L.Ed.2d 577 (1971), the Court of Appeals accelerated the briefing schedule in the case and heard oral arguments on June 7, 1971. The Court of Appeals issued its Order and Mandate on June 10, 1971.

REASONS FOR GRANTING THE WRIT

I. The Decisions of This Court Were Mechanically and Wrongly Applied by the Court of Appeals.

The conclusion of the District Court that the Board of Education was, in effect, operating a unitary system was amply supported by facts.

On appeal to the Court of Appeals the plaintiffs stated the facts quite differently than had been found by the District Court, but they did not challenge a single finding of the District Court as not being supported by the evidence; yet the facts as found by the District Court were ignored by the Court of Appeals in its Order and Mandate.

This Court held in Swann v. Charlotte-Mecklenburg Board of Education, supra, that based upon the findings of facts of the District Court, that Court had not abused its discretion in ordering the implementation of the Finger Plan as a means of desegregating the schools in the Charlotte-Mecklenburg system. This Court made it clear, however, as had the District Court, that its decision was based upon the facts of that case and that the remedy fashioned by

the District Court was appropriate in the light of those facts and was not necessarily required under different circumstances. The entire foundation for the District Court's order in that case, as clearly pointed out by this Court, was:

> "First, its express finding, approved by the Court of Appeals and not challenged here, that a dual school system had been maintained by the school authorities at least until 1969; second, its finding, also approved by the Court of Appeals, that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own, notwithstanding the patient efforts of the District Judge who, on at least three occasions, urged the Board to submit plans." Swann v. Charlotte-Mecklenburg Board of Education, 28 L.Ed.2d at 571.

Here the findings of fact are almost directly opposite. In the first place, it has never been admitted, and the District Court did not find, that the local board had not gone through the transition from the operation of a dual school system to a unitary system. In fact, the express finding

was that the Petitioner was operating a system in which no person was effectively excluded from any school because of race or color and such racial imbalance in the schools as existed was the adventitious result of residential housing patterns:

> "The Board strenuously contends that there has been no gerrymandering of the zone boundaries, and that the attendance zones are drawn based on nonracial criteria except where efforts were made to increase integration. On the other hand, the plaintiffs contend that the attendance zones are drawn to foster racial segregation. The Court finds no evidence to support the contention of the plaintiffs. Instead, it appears that the boundaries of the zones are drawn so that the pupils attend the school nearest their residence, recognizing natural boundaries, barriers and obstacles that might endanger the children, such as heavily traveled streets. Nevertheless, as will be later pointed out, there are two areas in the school system which the Court concludes will not meet the 'reasonableness test' established in Swann, et al v. Charlotte-Mecklenburg Board of Education, et al, supra." District Court Memorandum and Order of June 10, 1971 (A-60).

"The reasonable conclusion to be drawn from the evidence is that even though in times there has been some discrimination in the sale and rental of property, the concentration of the Negro population in the northeastern quadrant of the City has been caused by economic factors and the desire of blacks to live in areas where they do live rather than in white or predominantly white areas. This conclusion is confirmed by the fact that in resettling displaced blacks as a result of public housing projects, that without exception the blacks asked to be resettled in the same area where they lived, that is, in black or predominantly black areas, even though other areas were open. The concentration of blacks cannot be fairly attributed to public and private discrimination, and it is concluded that the housing patterns are not the result of such discrimination. In any event, where de jure segregation has been eliminated and de facto segregation remains, there surely must come a time when the stigma of de jure segregation is removed, certainly so in this situation, particularly in those areas once populated by whites and now all black or predominantly black." (A-62, 63).

The Court then concluded:

> "The area attendance zones of each school in the Winston-Salem/Forsyth County School Administrative Unit have been drawn without discrimination as to race or color and with due regard to all circumstances existing in each school area. Nevertheless, all reasonable means as required by Swann v. Charlotte-Mecklenburg Board of Education, supra, have not been utilized to change the racial composition at Diggs Elementary, Kimberly Park Elementary and Cook Elementary (Carver Crest)." (A-65, 66)

and

> "Except in the area of pupil composition, the Board's plan effects a unitary system." (A-67).

Even though the hearing and decision of the District Court antedated the decision of this Court in Swann, the District Court had closely scrutinized the facts relating to schools of one-race or virtually of one-race and had determined that the racial composition of those schools did not result from present or past discriminatory action. The District Court also had before it, considered, and rejected the "Larsen" Plan

submitted by the plaintiffs, which would have achieved a racial balance in each school in the system because

> "the undue burden which would result from the implementation of the Larsen Plan, not only upon the School Board, but vastly more important, upon the students, both black and white, within this system, far outweighs any benefits which might be derived therefrom." (A-31). (Emphasis added).

Finally, in contrast to Swann, the District Court found that the school board in this case had constantly cooperated with HEW authorities; had taken affirmative action that had resulted in significant amounts of racial integration in the various schools; had instituted on its own without an order of court a plan for the transfer of approximately 425 classroom teachers so that the ratio of black to white teachers in each school in the system was approximately at the ratio in the system as a whole; had never failed to submit whatever plans were required by the Court and had never failed to submit a plan that satisfied the requirements of the District Court and had exhibited a good faith effort to comport with the requirements of the Constitution. The District

Court in Swann had made it clear that "the orders of this Court have been confined to the only area they can properly embrace, and that is the rights of the particular parties represented in this case, on the particular facts and history of this case." Swann v. Charlotte-Mecklenburg Board of Education, 318 F.Supp. 787, 793 (M.D.N.C. 1970), affirmed ____U.S.____, 91 S. Ct. ____, 28 L.Ed.2d 554 (1971). (Emphasis in original). And so were the orders of the District Court in this case confined.

Despite these differences between the case at bar and Swann and despite the findings of fact of the District Court, the Court of Appeals in a per curiam decision ignored these findings and distinctions and ordered the school board to come forward with a new plan of desegregation "because the [District Judge] did not have the benefit of the Supreme Court mandate that adequate consideration be given 'to the possible use of bus transportation and split zoning.'" (A-99). The Court of Appeals required the petitioner to "submit a new plan to comply with Swann and Davis on or before July 1, 1971." (A-100).

The Court further provided that (A) "if the District Court approves a plan achieving less actual desegregation than would be achieved under an alternate proposed plan, it shall find facts that are thought to make impracticable the achieving

of a greater degree of integration especially if there remain any schools all or predominantly all of one race;" (A-101, 102) and (B) "in Winston-Salem/Forsyth County the school board may fashion its plan on the Larson (sic) plan with necessary modifications and refinements or adopt a plan of its choice which will meet the requirement of Swann and Davis." (A-103). (Dr. Finger, whose plan was adopted by the Court in the Swann case and Dr. Larsen, who proposed a plan in this case, are both members of the faculty of Rhode Island College, and Dr. Finger's plan for Charlotte-Mecklenburg is essentially the same as Dr. Larsen's plan for Winston-Salem/Forsyth County). The statements of the Court of Appeals, coupled with the fact that the massive bussing, groupings, pairings and other devices involved in the Finger plan were apparently found to be "practicable" by the Supreme Court, put the Winston-Salem/Forsyth County Board of Education in a position where it had no alternative but to achieve a racial balance throughout the school system in order to comply with the mandate of the Court of Appeals. The inevitability of this result is made clear by the June 22, 1971, Memorandum Order of the District Judge in this case, a copy of which is attached to this petition, (A-105, et seq) in which the District Court stated:

"Despite the substantial difference between the findings of this Court, which formed the predicate for this Court's June 25, 1970, opinion in this case, and the findings which formed the predicate of the decision of the District Court in Swann, it is apparent that it is as 'practicable' to desegregate all the public schools in the Winston-Salem/Forsyth County system as in the Charlotte-Mecklenburg system and that the appellate Courts will accept no less. Consequently, this Court can approve no less. The costs of otherwise unnecessary additional transportation, the time consuming burden and inconvenience imposed on pupils to achieve this result, and the problems imposed upon the school board and its staff should be no greater or more burdensome in the Winston-Salem/Forsyth County system than in the Charlotte-Mecklenburg system." (A-107, 108).

and also the Memorandum Order of the District Court of July 26, 1971 (A-110, et seq) in which the Court said:

"This Court in its Memorandum and Order of June 25, 1970, and its Order

of August 17, 1970, set out its findings and conclusions with respect to pupil assignment in the Winston-Salem/Forsyth County School System, and the Larsen Plan proposed by the plaintiffs and discussed the burdens and impracticalities which would necessarily attend the implementation of such a Plan. Notwithstanding said findings and conclusions, this Court must comply with the June 10, 1971, mandate of the Court of Appeals under which this case, on appeal, was remanded to this Court and must accordingly direct the Board of Education to proceed with the implementation of the 'Revised Pupil Assignment Plan for the 1971-72 School Year' hereinabove referred to." (A-114).

One of the principal lessons of the Swann decision is that local situations differ and that local school boards and District Judges should be deferred to in dealing with these situations. Yet, the Court of Appeals ignored the distinction between this case and the Swann decision and issued an order that failed to take into account the discretionary power of the District Judge. Under the order of the Court of Appeals, the District Judge could give no weight to his own unchallenged findings of fact and was strictly limited to

the rigid guidelines set out by the Court of Appeals in its opinion. This is in contrast to the Swann decision where this Court pointed out that local Courts were to have a "practical flexibility" in shaping remedies and that "the nature of the violation [would determine] the scope of the remedy." Swann, supra, 28 L.Ed.2d 567. See also Northcross v. Board of Education of Memphis, 397 U.S. 232 (1970), where this Court held that there was substantial evidence to support the finding of the District Court that a desegregation plan was inadequate and that the Court of Appeals had erred in substituting its own finding that the board was not operating a dual school system.

Although the Swann and Davis decisions had not come down at the time of the District Court's Order of June 25, 1970, it did consider the techniques held to be permissible to desegregate schools in those cases and, in its discretion, accepted and ordered the implementation of these techniques in some schools of the system, and rejected them in others. At the hearing on the merits prior to that decree, the District Court had before it the Larsen Plan which would have achieved a ratio of 22% to 43% black in each school in the system. The Court

examined that plan and assessed the practicalities of it, including the burdens and inconveniences it would place on the students affected, especially elementary students, and rejected it. If the emphasis of this Court in Swann upon the discretion of the District Court as a court of equity, is to have any meaning, the findings and decisions of the District Court in this case should have been upheld by the Court of Appeals; there is no basis for distinguishing between those cases in which the District Court has used it's discretion to fashion a decree achieving something short of a mathematical ratio in each school in the system and those in which it has exercised its discretion to achieve such a ratio, as the District Court did in Swann.

II. There Is a Conflict Between Circuits that Should be Resolved.

When the Court of Appeals for the Fourth Circuit in its Order and Mandate required that "if the District Court approves the plan achieving less actual desegregation than would be achieved under an alternate proposed plan, it shall find facts that are thought to make impracticable the achieving of a greater degree of integration especially if there remain any schools all or predominantly all of one race," (A-101, 102) and provided that the Larsen Plan

could be used, it removed all discretion from the District Court. Obviously, in any school district smaller than Charlotte-Mecklenburg, which like Charlotte-Mecklenburg is a county system in which a relatively large city is located that in turn contains a predominantly black residential area, it cannot be "impracticable" to racially balance each school in the system when it was not "impracticable" to do so in Charlotte-Mecklenburg.

The approach of the Court of Appeals in this case should be contrasted with that of the Court of Appeals for the Sixth Circuit in the case of Goss v. Board of Education of the City of Knoxville, No. 20834 (6th Cir., June 22, 1971). The Court remanded the case to the District Court for further proceedings consistent with Swann and the other opinions announced on April 20, 1971, but specifically declined to direct the achievement of any particular degree of desegregation or to accede to the plaintiff's request for a time table, and the authorization of an appointment of an education expert who would be paid by the school board. In doing so the Court took this view of the Swann decision,

> "We are not advised from what material plaintiffs constructed the elaborate rules and directions set out. It is apparent, however, that they are, in

substance, the commands of District Judge James B. McMillan, set out in his opinions in Swann v. Charlotte-Mecklenburg Board of Education, 306 F.Supp. 1299 (W.D.N.C. 1969) 311 F. Supp. 265 (1970), with some extensions and elaborations. The opinions of Judge McMillan, 306 F.Supp. 1299, 311 F.Supp. 265, and 318 F.Supp. 786, affirmed by the Supreme Court in Swann v. Charlotte-Mecklenburg Board of Education, _____U.S._____ (1971), express with some asperity his pique that the school authorities had failed to fully adopt a plan constructed by an expert, Dr. John Finger, who had been appointed by the District Judge. The District Court opinions reflect in observable measure Judge McMillan's doubts as to the genuineness of the school authorities' concern for the constitutional rights of both the black and white school children of Charlotte and Mecklenburg counties. The broadness of their commands bespeak some motivation of reprisal. In the long history of the litigation we deal with, we find no such bitter contesting between the school authorities of Knoxville and the Court, nor between the plaintiffs and the school authorities. We, therefore, initially observe that while the Supreme Court found legally

tolerable what may be referred to as the Mecklenburg rule, it by no means directed its commands be obeyed everywhere. We, therefore, conclude that there is nothing in Swann (1971) that requires us to announce a fiat imposing on Knoxville the identical pattern fashioned by Judge McMillan for his case." Goss, supra, Slip Opinion p. 6.

As made amply clear in the findings of fact of the District Court in its Memorandum and Order of June 25, 1970, this case, like the Goss case, does not contain the same elements of reluctance on the part of the school board to comply with the Orders of Court. Judge McMillan's Order requiring the implementation of the Finger Plan came only after no satisfactory plan was submitted by the school board. This Court recognized the importance of the context in which the Finger Plan was put into effect and found that in those circumstances it was within the discretion of the District Court. The Court of Appeals for the Fourth Circuit, on the other hand, ignored that context and treated the Mecklenburg rule as one of substantive law.

The findings of fact of the District Court in the instant case are similar to the findings in the typical case brought to eradicate de facto segregation such as Bell v. School City of Gary, Indianna, 324 F.2d 209 (7th Cir. 1963), cert. denied 377 U.S. 924, and Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966), cert. denied 389 U.S. 847, and Deal v. Cincinnati Board of Education, 419 F.2d 1387 (6th Cir. 1969), cert. denied because of late filing. In effect the school board in the case at bar overcame the presumption arising from the existence of a former dual school system and proved that the racial makeup of the various schools was due to factors other than state imposed segregation. The District Court so found. Assuming that the findings of the District Court are not clearly erroneous, and the Court of Appeals did not find that they were, there should be no difference between this case and one arising in a state in which there was no state imposed segregation in 1954, for, as the Court stated in Swann:

> "One vehicle can carry only a limited amount of baggage. It would not serve the important objective of Brown I to seek to use school desegregation cases for purposes beyond their scope although desegregation of schools will ultimately

have impact on other forms of discrimination. We do not reach in this case the question of whether in showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it." Swann, 28 L.Ed.2d at 570.

It is respectfully submitted that this Court should resolve this conflict between the Fourth and Sixth Circuits as to the meaning of Swann.

III. The Swann Decision has Raised Questions of Interpretation that Should be Answered.

Not only does the Petitioner contend that the decision of the Court of Appeals goes beyond constitutional requirements, and beyond the decisions of this Court in Swann and Davis, but implementation of a deliberate, racial pupil assignment plan under the mandate of the Court of Appeals creates an artificial, Court imposed scheme from which there appears to be no way for

the board to extricate itself in the future. In Swann the Court points to a light at the end of the tunnel with the following:

> "At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in Brown I. The systems will then be 'unitary' in the sense required for our decisions in Green and Alexander.
>
> "It does not follow that the community served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action has been eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a District Court should not be necessary. (Emphasis added) Swann, supra, 28 L.Ed.2d at 573.

The clear implication of the foregoing statements is that "once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system," the school systems of the South are to be treated the same as those outside of the South which have never had dual school systems and which, according to our understanding of Swann, are not in violation of the constitution so long as such segregation as may exist is not in any way attributable to past or present State action.

The achievement of this status appears necessarily to carry with it the right of a school board, once its school system is in full compliance, to make assignments thereafter on a non-discriminatory basis, without regard to race or color, and no longer to be required to adhere to bizarre racial pupil assignment plans in order to have a "unitary" school system. The practical difficulty is that once a Court orders the kind of artificial pupil assignment plan imposed on the Charlotte-Mecklenburg system and now being imposed on the Winston-Salem/Forsyth County system, there is no way to get away from such a plan and to revert to a normal, non-discriminatory pupil assignment plan similar to those existing elsewhere in the United States, unless the Court includes

in the Order a reasonable time when the Order will terminate, in the event it is not earlier terminated or extended by court order or general law. This Court has said that decrees such as the one rendered in Swann are "equitable decrees" to right a former wrong. If this be true and if "at some point the school authorities and others like them should have achieved full compliance" with Brown, then it would seem to be both appropriate and necessary for the Court to specify a reasonable time limit in these cases as is frequently found in antitrust and civil rights cases and certain other equitable decrees. What "equity" or constitutional requirement can possibly justify punishing the people of the South, both black and white, by saddling them with such costly, burdensome, racially motivated pupil assignment schemes, once all "vestiges" of a formal dual school system have been eliminated?

To comply with the orders of the Court of Appeals and District Court the Winston-Salem/Forsyth County Board of Education has filed a plan (A-116 et seq.), which the District Court by Memorandum Order of July 26, 1971, ordered the board of education to implement for the 1971-72 school year. In submitting this plan, the Board asked that it not be required to implement the plan

and alluded to some of the many reasons why it deemed impracticable the assignment of pupils to achieve a racial balance in this school system. Nothing can be more obvious than that the District Court, far from "fashioning an equitable decree," felt that it had no alternative but to order the implementation of a plan that neither the District Court would have required nor the board of education would have submitted had either had the discretion not to do so. This plan is appended to this petition: (1) to show the continuing good faith effort of this Board of Education to comply with the orders of the Courts; (2) to emphasize the importance of having prompt consideration given to this petition; and (3) to show in a more tangible way how many thousands of pupils must be subjected to the burden and inconveniences of otherwise unnecessary transportation, just to achieve a racial balance.

All racial assignments just to achieve racial balance in the schools necessitate earlier rising, later returning from school, fewer hours for study and play, fewer opportunities for participation in athletics and other "after school" extra curricular activities, greater transportation hazards, greater cost of school operations, greater

difficulty for parents to attend P.T.A. meetings, and numerous other burdens and inconveniences for everyone involved, both black and white. We submit that it is no answer to say that X percent would have to travel X miles to school anyway, so why should not that many more students be required to do so. Surely there is nothing in the Equal Protection Clause of the Constitution which can fairly be construed as requiring that all children shall travel five, ten or fifteen miles to school just because some children have to travel five, ten or fifteen miles to school. This burden is being imposed on this system and its pupils and parents solely because of their race. This, we submit, is the antithesis of what this Court intended in Brown v. Board of Education, 347 U.S. 483 (1954) and Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969).

Respectfully submitted,

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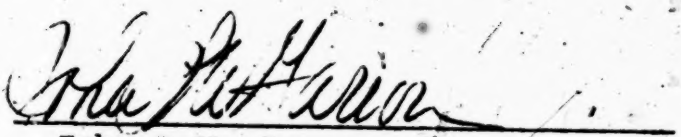

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